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Chow Tat Chow & Anor v Mammoth Empire Land Sdn Bhd

B HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCvC-152–04 OF 2021
TEE GEOK HOCK JC
25 NOVEMBER 2021

C *Civil Procedure — Summary judgment — Application for summary judgment — Claim for liquidated damages for failure to deliver vacant possession — Whether claim was premature — Whether defendant had bona fide defences to the claim — Whether there was real dispute as to the amount due — Whether there were triable issues*

D

Land Law — Delivery of vacant possessio — Late delivery of vacant possession — Whether plaintiffs had locus standi to sue defendant for liquidated damages — Whether plaintiff entitled to liquidated damages for late delivery of vacant
E *possession — Whether plaintiff entitled to liquidated damages for late completion of common facilities — Whether computation of damages should be based on purchase price in sale and purchase agreement or actual purchase price — Whether plaintiffs entitled to bank interests*

F By a sale and purchase agreement ('SPA') dated 28 October 2011 under Schedule H of the Housing Development (Control and Licensing) Act 1966, the defendant as the vendor agreed to sell and the plaintiffs as the purchasers agreed to purchase a unit of condominium ('the parcel'). By a rebate letter dated 17 February 2012, the plaintiffs were given a rebate of RM143,904 from
G the purchase price of RM1,798,800. The actual purchase price for the parcel was therefore RM1,654,896. The plaintiffs obtained a bank loan to part-finance the purchase of the parcel, and thereupon on 30 March 2012, the plaintiffs entered into loan agreement cum assignment ('LACA') with the bank where she absolutely assigned all their rights and benefit under the SPA to the
H Bank. By a letter dated 11 August 2014, the defendant was granted an extension of time for six months to deliver vacant possession of the parcel ('EOT') by the Ministry of Urban Wellbeing, Housing and Local Government ('housing ministry'). The plaintiffs did not dispute the EOT by the housing ministry. By a document dated 4 January 2016 the architect issued an
I architect's certificate certifying the date of completion of the common facilities. As at the date of the filing of the present suit, the vacant possession of the parcel had yet to be delivered by the defendant to the plaintiffs. This non-delivery of vacant possession of the parcel was not disputed by the defendant. The plaintiffs then filed an application for summary judgment and claimed for:

(a) liquidated damages for failure to deliver vacant possession of the parcel within the contractual time and until the date of delivery of the vacant possession; (b) liquidated damages for failure to complete the common facilities within the contractual time and until the date of completion of the common facilities; and (c) interests on the bank loan and the amount claimed. The defendant on the other hand, argued that: (i) the action was premature; (ii) The defendant had meritorious and bona fide defences on the plaintiffs' claims on the merits; (iii) there was a real dispute as to the amount due which required the taking of an account to determine; and (iv) there were issues to be tried.

Held, allowing the application with costs:

(1) It was the decision of the court that the defendant had no triable defence by an allegation of premature cause of action under the Schedule H SPA. In light of the decided authorities, there was no triable issue regarding the defendant's submission on premature action. Accordingly, the court held that the plaintiff's present action was not filed prematurely (see paras 15 & 21–22).

(2) In the circumstances, it was clear that the plaintiffs had complied with the notice procedure under cl 7 of the SPA. In the premises, the plaintiffs had the *locus standi* to sue the defendant for the liquidated damages under the SPA. In light of the express statutory provisions in s 22C of the Housing Development (Control and Licensing) Act 1966 and the express contractual provisions in cl 7 of the Schedule H SPA, it was baseless and erroneous for the defendant to refer the court to cases on the common law consequence of the effect of an absolute assignment. To the extent of any conflict or inconsistency with an express statutory provision or an express term of the statutory Schedule H SPA, the common law principles on the effect of an absolute assignment had been superseded (see paras 26–28).

(3) The court had no objection in principle for the claim for the liquidated damages for late delivery of vacant possession of the parcel to be split into two parts, one part being a specific amount for the period from the due date until the date of writ and another part at a specified rate per day from the day immediately after the date of the writ until the future date of the delivery of vacant possession of the parcel. There are other examples of cases of contractual claims where the courts awarded a head of special damages which was split into two parts, one part being a specific amount for the period from the due date ie accrual date until the date of writ and another part at a specified rate per day from the day immediately after the date of the writ until a future date. The court also failed to see why and how the defendant coul make any triable issue out of the start date of 27 April 2015 for the plaintiffs' computation of the liquidated damages for late delivery of vacant possession of the parcel. In the circumstances,

A the court found that the issues raised by the defendant in respect of the liquidated damages were not triable issues (see paras 38–40).

(4) Any attempt to compute the liquidated damages under the Schedule H SPA by using a discounted purchase price which was not the purchase B price expressly stated in the said agreement was tantamount to contracting out of the statute and was therefore null and void. In the premises, the court held that issues in respect of the purchase price to be used in the computation of liquidated damages raised by the defendant are not triable issues (see paras 43–44).

C (5) In the considered view of the court, the liquidated damages for delay in the completion of the common facilities and for the delay in delivery of vacant possession of the parcel had included the agreed and liquidated compensation for all the components of delay damages including interests on bank loan, loss of use, loss of rental income, and other losses D and damages which the purchasers had suffered or would suffer as a result of the delay in the completion of the common facilities and for delay in delivery of the vacant possession of the parcel. Any award of bank interests to the plaintiffs in addition to the liquidated damages for delay in the completion of the common facilities and for delay in delivery of the E vacant possession of the parcel would be tantamount to double recovery which the law did not permit. In the premises, the court held that the plaintiffs were not entitled to claim for financing interests paid or payable to the lender-bank over and above the liquidated damages claim for delay in delivery of possession, as that would constitute double recovery and/or F overlapping claims (see para 46).

(6) In the considered view of the court, the express and specific statutory provisions in the Housing Development (Control and Licensing) Act 1966 had modified and superseded the general provisions in s 75 of the G Contracts Act 1950 to the extent that in claims under the Schedule H sale and purchase agreements in respect of residential properties, the defendant could not argue that the correct rate of liquidated damages for delay in delivery of vacant possession of the parcel was 10%pa of the purchase price and that of delay in completion of the common facilities H is one-fifth of 10%pa of the purchase price. In the premises, the court dismissed the plaintiffs' claim for recovery of interests paid or payable by the plaintiff to the end-financing bank (see paras 48–49).

[Bahasa Malaysia summary

I Melalui perjanjian jual beli ('SPA') bertarikh 28 Oktober 2011 di bawah Jadual H Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966, defendan sebagai penjual telah bersetuju untuk menjual dan plaintif sebagai pembeli bersetuju untuk membeli seunit kondominium ('parsel tersebut'). Melalui surat rebat bertarikh 17 Februari 2012, plaintif telah diberi rebat sebanyak

RM143,904 daripada harga belian RM1,798,800. Oleh itu, harga belian sebenar bagi parsel tersebut adalah RM1,654,896. Plaintif memperoleh pinjaman bank untuk membiayai sebahagian pembelian parsel tersebut, dan lanjutan itu pada 30 Mac 2012, plaintif menandatangani perjanjian pinjaman merangkap penyerahhakan ('LACA') dengan bank di mana beliau secara mutlak menyerahkan kesemua hak dan faedah di bawah SPA kepada Bank. Melalui surat bertarikh 11 Ogos 2014, defendan telah diberikan lanjutan masa selama enam bulan untuk menyerahkan milikan kosong parsel tersebut ('EOT') oleh Kementerian Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan ('kementerian perumahan'). Plaintif tidak mempertikaikan EOT oleh kementerian perumahan. Melalui dokumen bertarikh 4 Januari 2016 arkitek mengeluarkan sijil arkitek yang memperakui tarikh siap kemudahan bersama. Pada tarikh pemfailan Tindakan semasa, milikan kosong parsel tersebut masih belum diserahkan oleh defendan kepada plaintif. Kegagalan penyerahan milikan kosong parsel tersebut tidak dipertikaikan oleh defendan. Plaintif kemudiannya memfailkan permohonan untuk penghakiman terus dan menuntut: (a) ganti rugi tertentu dan ditetapkan kerana kegagalan menyerahkan milikan kosong parsel tersebut dalam masa kontraktual dan sehingga tarikh penyerahan milikan kosong; (b) ganti rugi tertentu dan ditetapkan kerana kegagalan menyempurnakan kemudahan bersama dalam masa kontraktual dan sehingga tarikh siap kemudahan bersama; dan (c) faedah ke atas pinjaman bank dan amaun yang dituntut. Defendan sebaliknya, berhujah bahawa: (i) tindakan tersebut adalah pramatang; (ii) Defendan mempunyai pembelaan yang bermerit dan bona fide terhadap tuntutan plaintif atas merit; (iii) terdapat pertikaian sebenar tentang jumlah yang perlu dibayar yang memerlukan pengambilan akaun untuk menentukan; dan (iv) terdapat isu yang perlu dibicarakan.

Diputuskan, membenarkan permohonan dengan kos:

(1) Ia adalah keputusan mahkamah bahawa defendan tidak mempunyai pembelaan yang boleh dibicarakan dengan dakwaan kausa tindakan pramatang di bawah Jadual H SPA. Berdasarkan otoriti yang telah diputuskan, tidak ada isu yang boleh dibicarakan mengenai penghujahan defendan mengenai tindakan pramatang. Sehubungan itu, mahkamah memutuskan bahawa tindakan plaintif semasa tidak difailkan secara pramatang (lihat perenggan 15 & 21–22).

(2) Dalam keadaan itu, ia adalah jelas bahawa plaintif telah mematuhi prosedur notis di bawah klausa 7 SPA. Di dalam premis itu, plaintif mempunyai locus standi untuk menyaman defendan bagi ganti rugi tertentu dan ditetapkan di bawah SPA. Memandangkan peruntukan undang-undang nyata dalam s 22C Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 dan peruntukan kontrak nyata dalam klausa 7 Jadual H SPA, ianya adalah tidak berasas dan terkhilaf bagi defendan untuk merujuk mahkamah kepada kes-kes 'common law'

A mengenai akibat kesan serahanhak mutlak. Setakatmana sebarang konflik atau ketidakselarasan dengan peruntukan perundangan nyata atau terma nyata Jadual H SPA, prinsip 'common law' mengenai kesan penyerahan hak mutlak telah dilangkaui (lihat perenggan 26–28).

B (3) Mahkamah tidak mempunyai bantahan pada dasarnya untuk tuntutan ganti rugi tertentu dan ditetapkan bagi penyerahan lewat milikan kosong parsel tersebut dipecahkan kepada dua bahagian, satu bahagian adalah jumlah tertentu untuk tempoh dari tarikh matang sehingga tarikh writ dan bahagian lain pada kadar yang ditetapkan setiap hari dari hari sebaik C selepas tarikh writ sehingga tarikh masa hadapan penyerahan milikan kosong parsel tersebut. Terdapat contoh lain kes tuntutan kontraktual di mana mahkamah membenarkan ganti rugi khas utaman yang dibahagikan kepada dua bahagian, satu bahagian adalah amaun khusus untuk tempoh dari tarikh matang iaitu tarikh akruan sehingga tarikh writ D dan satu bahagian lagi pada kadar tertentu setiap hari dari hari sebaik selepas tarikh writ sehingga tarikh akan datang. Mahkamah juga gagal untuk melihat mengapa dan bagaimana defendan boleh menyatakan sebarang isu yang boleh dibicarakan dari tarikh mula 27 April 2015 untuk pengiraan bagi ganti rugi tertentu dan ditetapkan kerana E kelewatan penyerahan milikan kosong parsel tersebut. Dalam keadaan tersebut, mahkamah mendapati bahawa isu yang dibangkitkan oleh defendan berkenaan dengan ganti rugi yang tertentu dan ditetapkan bukanlah isu yang boleh dibicarakan (lihat perenggan 38–40).

F (4) Sebarang percubaan untuk mengira ganti rugi tertentu dan ditetapkan di bawah Jadual H SPA dengan menggunakan harga belian diskaun yang bukan harga belian yang dinyatakan dengan jelas dalam perjanjian tersebut adalah terjumlah kepada perjanjian di luar perundangan dan oleh itu adalah terbatal dan tidak sah. Di dalam premis itu, mahkamah G memutuskan bahawa isu berkenaan dengan harga belian yang akan digunakan dalam pengiraan ganti rugi terterntu dan ditetapkan yang dibangkitkan oleh defendan bukanlah isu yang boleh dibicarakan. (lihat perenggan 43–44).

H (5) Berdasarkan pertimbangan mahkamah, ganti rugi tertentu dan ditetapkan kerana kelewatan menyiapkan kemudahan bersama dan untuk kelewatan penyerahan milikan kosong parsel tersebut telah termasuk pampasan yang dipersetujui dan ditetapkan untuk semua komponen kerugian kelewatan termasuk faedah. atas pinjaman bank, kehilangan penggunaan, kehilangan pendapatan sewa, dan kerugian dan I kerosakan lain yang telah dialami atau akan dialami oleh pembeli akibat kelewatan dalam menyiapkan kemudahan bersama dan kelewatan penyerahan milikan kosong parsel tersebut. Sebarang pemberian faedah bank kepada plaintif sebagai tambahan kepada ganti rugi tertentu dan ditetapkan kerana kelewatan menyiapkan kemudahan bersama dan

kelewatan penyerahan milikan kosong persel tersebut akan terjumlah kepada pemberian berganda yang tidak dibenarkan oleh undang-undang. Di dalam premis itu, mahkamah memutuskan bahawa plaintif tidak berhak untuk menuntut faedah pembiayaan yang dibayar atau perlu dibayar kepada bank pemberi pinjaman melebihi tuntutan ganti rugi tertentu dan ditetapkan kerana kelewatan penyerahan milikan, kerana ia adalah terjumlah kepada pemberian berganda dan/atau tuntutan bertindih (lihat perenggan 46).

(6) Berdasarkan pertimbangan mahkamah, peruntukan berkanun yang nyata dan khusus dalam Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 telah mengubah suai dan menggantikan peruntukan am dalam s 75 Akta Kontrak 1950 setakatmana dalam tuntutan di bawah Perjanjian jual beli Jadual H berkenaan dengan hartanah kediaman, defendan tidak boleh berhujah bahawa kadar ganti rugi tertentu dan ditetapkan yang betul untuk kelewatan penyerahan milikan kosong parsel tersebut adalah 10% setahun daripada harga belian dan kelewatan penyiapan kemudahan Bersama adalah satu perlima daripada 10% setahun daripada harga belian. Di dalam premis itu, mahkamah menolak tuntutan plaintif untuk mendapatkan semula faedah yang dibayar atau perlu dibayar oleh plaintif kepada pembiayaan akhir bank (lihat perenggan 48–49).]

Cases referred to

Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281; [2020] 1 CLJ 162, FC (refd)

Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd [2019] 6 MLJ 15; [2019] 2 CLJ 723, FC (refd)

Episo Enterprise Sdn Bhd v Wong Chong Sing & Anor [2018] MLJU 1422, HC (refd)

Ganda Selat Sdn Bhd v Mohammadi bin Mt Abu @ Ramli & Ors [2019] MLJU 1651, HC (refd)

Leong Kum Loon v Glomac Kristal Sdn Bhd and another appeal [2020] MLJU 778; [2020] 1 LNS 1094, CA (refd)

PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals [2021] 2 MLJ 60; [2021] 2 CLJ 441, FC (refd)

Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817; [1995] 2 CLJ 584, FC (refd)

Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors [2008] 4 MLJ 852; [2008] 4 CLJ 618, CA (refd)

Legislation referred to

Contracts Act 1950 s 75

Housing Development (Control and Licensing) Act 1966 s 22C, Schedule H

A Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 s 35

Lee Chong Jin Janson (CJ Lee & Ho) for the plaintiffs.
Loo Ying Ning (Shearn Delamore & Co) for the defendant.

B

Tee Geok Hock JC:

INTRODUCTION

C **[1]** On 30 September 2021 this court granted a summary judgment in favour of the plaintiffs in respect of liquidated damages for late delivery of vacant possession of a condominium unit and late completion of common facilities under the Schedule H sale and purchase agreement.

D **[2]** Being dissatisfied with the said decision dated 30 September 2021, the defendant has appealed against the said decision.

FACTS OF THE CASE

E **[3]** By sale and purchase agreement dated 28 October 2011 under Schedule H of the Housing Development (Control and Licensing) Act, the defendant as the vendor agreed to sell and the plaintiffs as the purchasers agreed to purchase a unit of condominium ('the parcel') (exh 'CTC1' of the affidavit in support affirmed by Chow Tat Chow on 28 May 2021 ('P's AIS')).

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[4] By a rebate letter dated 17 February 2012 the plaintiffs were given a rebate of RM143,904 from the purchase price of RM1,798,800. Actual purchase price for the parcel is therefore RM1,654,896 (exh 'CJY2' of the defendant's affidavit in reply ('D's AIR')).

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[5] The plaintiffs obtained a bank loan to part-finance the purchase of the parcel, and thereupon on 30 March 2012 the plaintiffs entered into loan agreement cum assignment ('LACA') with the bank where she absolutely assigned all their rights and benefit under the SPA to the bank (exh 'CJY1' of the D's AIR).

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[6] By a letter dated 11 August 2014 the defendant was granted an extension of time for six months to deliver vacant possession of the parcel ('EOT') by the Ministry of Urban Wellbeing, Housing and Local Government ('housing ministry') (exh 'CTC2' of the P's AIS).

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[7] In our present case, the plaintiffs are not disputing the extension of time by the housing ministry.

[8] By a document dated 4 January 2016 the architect issued an architect's certificate certifying the date of completion of the common facilities (exh 'CJY4' of the D's AIR).

[9] As at the date of filing of the present suit, the vacant possession of the parcel has yet to be delivered by the defendant to the plaintiffs. This non-delivery of vacant possession of the parcel is not disputed by the defendant.

PLAINTIFFS' CLAIMS AND THE DEFENDANT'S DEFENCES

[10] In the application for summary judgment, the plaintiffs claim for:

(1) liquidated damages for failure to deliver vacant possession of the parcel within the contractual time in the amount of RM1,069,916.38 from 27 April 2015 to 8 April 2021;

(2) continuing liquidated damages for the failure to deliver vacant possession of the parcel at the rate of RM492.82 per day from 9 April 2021 until the date of delivery of the vacant possession;

(3) liquidated damages for failure to complete the common facilities within the contractual time in the amount of RM213,983.27 from 27 April 2015 until 9 April 2021;

(4) continuing liquidated damages for the failure to complete the common facilities from 9 April 2021 until the date of completion of the common facilities;

(5) RM339,676 as the interests on the bank loan from 1 January 2014 until 31 March 2021 and still continuing;

(6) interests at 5%pa on the abovementioned amounts from the date of the writ until the date of full realisation; etc.

[11] In the course of the submissions, the plaintiffs reduced the period and amount of their claims in respect of failure to complete the common facilities from the pleaded amount of RM213,983.27 (in respect of the period from 27 April 2015 until 9 April 2021) to the revised and reduced amount of RM24,838.22 only (in respect of the revised period from 27 April 2015 until 4 January 2016). In doing so, the plaintiffs agreed with the defendant's position that the date of completion of the common facilities was 27 April 2015 as stated in the architect's certificate dated 4 January 2016.

[12] In the defence and in the submissions, the defendant relied on the following defences and/or arguments:

(a) the present action is premature;

A (b) the defendant has meritorious and bona fide defences on the plaintiffs' claims on the merits;

(c) there is a real dispute as to the amount due which requires the taking of an account to determine; and

B (d) there are issues to be tried.

[13] In arguing that there are triable issues, the defendant contends that the following issues are triable:

C *Computation of LAD — common facilities*

(a) when were common facilities to the parcel completed pursuant to the SPA?

D (b) are the plaintiffs entitled to claim late completion of common facilities on the basis that the common facilities have been completed and issued certificate of completion and compliance ('CCC') but vacant possession has not been given to the plaintiffs?

E (c) what is the contractual obligation under the SPA with regards to LAD on late completion of common facilities?

(d) what is the correct computation for LAD for late completion of common facilities given the extension of time granted by the housing ministry?

F *Computation of LAD – vacant possession*

(e) is the claim for LAD for late delivery of vacant possession premature?

G (f) what is the correct computation of date of delivery of vacant possession pursuant to the SPA?

(g) what is the correct computation for LAD for late delivery of vacant
H possession given the extension of time granted by the housing ministry and s 35 of the Covid-19 Act?

Actual purchase price

I (h) whether parties have bilaterally varied the terms of computation of the LAD for completion of common facilities by reason of the rebate granted to the plaintiffs?

(i) was there a bilateral variation of the purchase price? A

(j) should the computation of LAD be based on the SPA purchase price or the actual purchase price?

B

Locus standi

Whether the plaintiffs have the necessary locus standi to commence and maintain the present action given that they have irrevocably and unconditionally assigned their rights to the bank pursuant to the LACA? C

WHETHER THE PRESENT ACTION IS PREMATURE

[14] It is the contention of the defendant that pursuant cl 25(3) of the SPA, the cause of action for LAD for late delivery of vacant possession of the parcel shall accrue on the date the plaintiffs take vacant possession of the parcel, and since the vacant possession of the parcel has still not been delivered as at the date of the writ, the plaintiffs' cause of action for LAD for late delivery of vacant possession has yet to accrue and therefore the present action is premature. D

E

[15] It is the decision of this court that the defendant has no triable defence an allegation of premature cause of action under the Schedule H sale and purchase agreement: see the decision of the Court of Appeal in *Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors* [2008] 4 MLJ 852; [2008] 4 CLJ 618 and the decisions of the High Court in *Ganda Selat Sdn Bhd v Mohammadi bin Mt Abu @ Ramli & Ors* [2019] MLJU 1651 and *Episo Enterprise Sdn Bhd v Wong Chong Sing & Anor* [2018] MLJU 1422. F

[16] In *Ganda Selat* case, the learned High Court judge held as follows:

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> It is of the considered view that the presence of the words 'shall be liable to pay' in sub-cl 26(2) of the SPAs is significant to mean that the defendant's right to be paid LAD is automatic once there is delay by the developer/vendor to hand over vacant possession to the defendants as purchasers of the units.
>
> On a proper construction of cl 26(2) of the SPAs it is clear that *a housing developer is immediately liable to a purchaser in liquidated damages once the date of completion passes.* H
>
> ... The courts have recognized the claim for LAD even *without the delivery of vacant possession* to the purchasers.
>
> Before this court, *there is no evidence proferred by the plaintiff (developer) to show or justify why the plaintiff fails to complete the project.* All the respective SPAs are now incapable of performance through no fault of the defendants (purchasers). The plaintiff is the defaulting party herein who has breached the SPAs entered with the defendants in failing to complete the project within 36 months stipulated period. To allow the plaintiff to use cl 26(3) of the SAPs in that no vacant possession has I

taken place and that therefore the defendants are not entitled to LAD as yet, *would be absurd* and contrary to cl 26(2) of the SPAs *and will cause injustice to the defendants* ...

The LAD premised on an abandoned housing project involves a claim which is owing and payable by the housing developer. The defendants are entitled to the LAD, and the delivery of vacant possession which is now impossible due to the project being an abandoned project cannot be a perquisite for the defendants to claim such rights as it would mean that the defendants will never be paid LAD after all. That cannot be the intention of the Act pre or post amendments.

[17] In the considered view of this court, the aforesaid High Court decisions are consistent with the objective and policy of the statute (a social legislation) as decided by the Federal Court in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162 and in *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60; [2021] 2 CLJ 441 and by the Court of Appeal in *Leong Kum Loon v Glomac Kristal Sdn Bhd and another appeal* [2020] MLJU 778; [2020] 1 LNS 1094.

[18] In the recent Federal Court decision of *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162, Tengku Maimun Tuan Mat CJ said in no uncertain terms of the character of the Housing Development (Control and Licensing) Act 1966 and how the provisions of the Act and its regulations are to be construed:

[40] The Act being a social legislation designed to protect the house buyers, the interests of the purchasers shall be the paramount consideration against the developer ...

[19] In *Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors* [2008] 4 MLJ 852; [2008] 4 CLJ 618, the Court of Appeal also held as follows:

... The contract that has fallen for construction in the present cases is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Form H cannot contract out of the scheduled form. Terms more onerous to a purchaser may not be imposed. So too, terms imposing additional obligations on the part of the purchaser may not be included in the statutory form of contract. It follows that the requirement of notice under s 56(3) which is an additional obligation to the detriment of the purchaser cannot be imposed on the respondents here in the light of the statutory scheme under the Act. This is evident in the language of cl 22(2). *On its proper construction, the clause makes a housing developer immediately liable to a purchaser in liquidated damages once the date of completion passes.* Put differently, cl 22(2) excludes the operation of s 56(3). This is another reason for holding that s

56(3) of the Contracts Act 1950 does not apply in cases falling under the Act. (Emphasis added.)

[20] The immediately foregoing passage of the Court of Appeal's judgment in *Sentul Raya* case has been quoted with approval by the Federal Court in *Ang Ming Lee* case.

[21] In light of the abovementioned decided authorities, there is no triable issue regarding the defendant's submission on premature action.

[22] Accordingly, this court has held that the plaintiff's present action was not filed prematurely.

LOCUS STANDI

[23] Section 22C of the Housing Development(Control and Licensing) Act provides as follows:

22C Right to initiate and maintain actions.

Notwithstanding anything contained in any written law or any rule of law, agreement, assignment or charge lawfully entered into between a homebuyer as defined in s 16A and his financier, a homebuyer shall be entitled on his own volition and in his own name to initiate, commence, institute and maintain in any court or tribunal any action, suit or proceeding against a housing developer or any other person in respect of any matter arising out of the sale and purchase agreement entered into between the homebuyer and the housing developer provided the homebuyer's financier under a deed of absolute assignment is notified in writing either before or within fourteen days after the action, suit or proceeding against the housing developer has been filed before any court or tribunal.

[24] In the sale and purchase agreement between the defendant-vendor and the plaintiffs-purchasers, cl 7 provides as follows:

The purchaser shall be entitled on his own volition in his own name to initiate, commence, institute and maintain in any court or tribunal any action, suit or proceeding against the *proprietor and/or vendor or any other person in respect of any matter arising out of this agreement provided the purchaser's financier under a deed of absolute assignment is notified in writing either before or within fourteen days after the action, suit or proceeding against the *proprietor and/or vendor or any such other person has been filed before any court or tribunal.

[25] By letter dated 3 March 2021 the plaintiffs' solicitors on behalf of the plaintiffs gave written notice to the assignee-bank UOB Bank (M) Bhd of the

plaintiffs' intention to claim liquidated damages under the sale and purchase agreement against the defendant-vendor: plaintiffs' affidavit in reply ('encl 10') exh 'CTC5'.

[26] In the circumstances, it is clear that the plaintiffs have complied with the notice procedure under cl 7 of the sale and purchase agreement.

[27] In the premises, the plaintiffs have the locus standi to sue the defendant for the liquidated damages under the sale and purchase agreement.

[28] In light of the express statutory provisions in s 22C of the Housing Development (Control and Licensing) Act 1966 and the express contractual provisions in cl 7 of the Schedule H sale and purchase agreement, it is baseless and erroneous for the defendant to refer to the court cases on the common law consequence of the effect of an absolute assignment. To the extent of any conflict or inconsistency with an express statutory provision or an express term of the statutory Schedule H sale and purchase agreement, the common law principles on the effect of an absolute assignment have been superseded.

LIQUIDATED DAMAGES FOR COMMON FACILITIES

[29] In respect of the liquidated damages for the late completion of common facilities, the defendant has attempted to raise the following issues:

(a) when were common facilities to the parcel completed pursuant to the SPA?

(b) are the plaintiffs entitled to claim late completion of common facilities on the basis that the common facilities have been completed and issued certificate of completion and compliance ('CCC') but vacant possession has not been given to the plaintiffs?

(c) what is the contractual obligation under the SPA with regards to LAD on late completion of common facilities?

(d) what is the correct computation for LAD for late completion of common facilities given the extension of time granted by the housing ministry?

[30] In the plaintiffs' original claims for liquidated damages in respect of the common facilities, the plaintiffs in their statement of claims and their application for summary judgment claimed for (a) liquidated damages for failure to complete the common facilities within the contractual time in the amount of RM213,983.27 from 27 April 2015 until 9 April 2021; and

(b) continuing liquidated damages for the failure to complete the common facilities from 9 April 2021 until the date of completion of the common facilities.

[31] After having sight of the defendant's affidavit in reply and the architect's certificate which certified the common facilities as completed 4 January 2016, the plaintiffs in their written submission have graciously agreed to reduce the amount of their claims for liquidated damages for the failure to complete the common facilities to RM24,838.22, ie only until 4 January 2016, the date as per the architect's certificate. On the basis of the plaintiffs' said concession or agreement, the court awarded the total amount of the plaintiffs' claims for liquidated damages for the failure to complete the common facilities at RM24,838.22, ie only until 4 January 2016 as per the plaintiffs' written submission.

[32] In the premises, issues (a)–(d) raised by the defendant have become academic and are no longer triable issues.

[33] As an ancillary note, this court wishes to clarify that the award of the total amount of the plaintiffs' claims for liquidated damages for the failure to complete the common facilities at RM24,838.22, ie only until 4 January 2016 in the present case does not mean that the court has made any decision on the merits or demerits of the defendant's issues (a)–(d) regarding the common facilities. This defendant's issues (a)–(d) regarding the common facilities have, by the gracious concession on the part of the plaintiffs in their written submissions, have become academic and unnecessary for decision here because by the plaintiffs' written submissions they have reduced their amount of claim for liquidated damages in respect of the common facilities to the reduced amount of RM24,838.22 based on the date of completion of the common facilities as alleged by the defendant.

LIQUIDATED DAMAGES FOR DELAY IN DELIVERY OF VACANT POSSESSION OF THE PARCEL

[34] In respect of the liquidated damages for the late completion and/or delivery of the parcel, the defendant has attempted to raise the following issues:

(e) is the claim for LAD for late delivery of vacant possession premature?

(f) ahat is the correct computation of date of delivery of vacant possession pursuant to the SPA?

(g) What is the correct computation for LAD for late delivery of vacant possession given the extension of time granted by the housing ministry and s 35 of the Covid-19 Act?

[35] Issue (e) has been dealt with in paras 14–22 above and this court has held that the plaintiffs' suit for the liquidated damages for late delivery of vacant possession of the parcel is not premature. As such, issue (e) is not a triable issue.

[36] It is clear that the total amount of the liquidated damages for late delivery of vacant possession of the parcel is clearly stipulated in the Schedule H sale and purchase agreement as 10%pa of the purchase price of the parcel and mathematically it is expressed in the following formula:

LAD amount = (purchase price x 0.1 x delay in number of days)/365.

[37] The continuing LAD per day after 8 April 2021 is RM1,798,800 x 10% x 1/365 = RM492.82 per day.

[38] This court sees no objection in principle for the claim for the liquidated damages for late delivery of vacant possession of the parcel to be split into two parts, one part being a specific amount for the period from the due date until the date of writ and another part at a specified rate per day from the day immediately after the date of the writ until the future date of the delivery of vacant possession of the parcel. In court judgments for finance charges or interests, it is common practice for financing charges or interest until date of writ or judgment to be computed and awarded at a specific amount and then award another part as finance charges or interest thereafter at a specified rate per day or per month or per year. In suits relating to tenancy agreements by landlords against tenants for eviction and double rental for overstay under an express term of the respective tenancy agreement, it is also common practice for the court to grant an eviction order plus an award of a specific amount of double rental for the period of overstay until the date or writ or judgment as well as another award of a specified rate of double rental per month for the subsequent period until the date of eventual delivery of the vacant possession by the tenant to the landlord. There are also other examples of cases of contractual claims where the courts awards a head of special damages which is split into two parts, one part being a specific amount for the period from the due date oe accrual date until the date of writ and another part at a specified rate per day from the day immediately after the date of the writ until a future date.

[39] As regards issue (f), the parties' Schedule H sale and purchase agreement dated 28 October 2011, with the original due date for delivery of vacant possession of the parcel on 27 November 2014. By a letter dated 11 August 2014 the defendant was granted an extension of time for six months to delivery vacant possession of the parcel ('EOT') by the Ministry of Urban Wellbeing, Housing and Local Government ('housing ministry') (exh 'CTC2' of the P's AIS). The plaintiff-purchasers, in computing their liquidated damages as from

27 April 2015, has graciously decided not to pursue the claim in respect of the six months extension granted by the housing ministry, although decided authorities seem to suggest that the plaintiffs need not waive their claims for such six months extended period: see *Ang Ming Lee* case. This court fails to see why and how the defendant can make any triable issue out of the start date of 27 April 2015 for the plaintiffs' computation of the liquidated damages for late delivery of vacant possession of the parcel in our present case.

[40] In the circumstances, this court finds that issues (e) and (f) raised by the defendant are not triable issues.

AMOUNT OF PURCHASE PRICE USED IN COMPUTATION OF LIQUIDATED DAMAGES

[41] In respect of the amount of the purchase price to be used in the computation of liquidated damages, the defendant raised the following issues:

(h) whether parties have bilaterally varied the terms of computation of the LAD for completion of common facilities by reason of the rebate granted to the plaintiffs?

(i) was there a bilateral variation of the purchase price?

(j) should the computation of LAD be based on the SPA purchase price or the actual purchase price?

[42] In *PJD Regency* case, the Federal Court held that the liquidated damages under the Schedule H sale and purchase agreements shall be computed on the purchase price stated in the sale and purchase agreement, and not computed on the discounted purchase price extraneous of the sale and purchase agreement: see paras 120–125 of the judgment.

[43] Any attempt to compute the liquidated damages under the Schedule H sale and purchase agreement by using a discounted purchase price which is not the purchase price expressly stated in the said agreement is tantamount to contracting out of the statue and is therefore null and void.

[44] In the premises, this court has held that issues (g), (h) and (i) raised by the defendant are not triable issues.

CLAIM FOR BANK INTERESTS

[45] In our present case the plaintiffs also claims for an amount of RM339,676 being the total amount of bank interests they have paid from 1 January 2014 until 31 March 2021 to the end-financing bank who granted a bank loan to part-finance their purchase of the parcel and to whom the

plaintiffs have made payments to service the monthly interest on the loan amount which has been drawn down. In addition, the plaintiff also claims for the future interests which are still continuing.

[46] In the considered view of this court, the liquidated damages for delay in the completion of the common facilities and for delay in delivery of the vacant possession of the parcel have included the agreed and liquidated compensation for all the components of delay damages including interests on bank loan, loss of use, loss of rental income, and other losses and damages which the purchasers have suffered or would suffer as a result of the delay in the completion of the common facilities and for delay in delivery of the vacant possession of the parcel. Any award of bank interests to the purchasers in addition to the liquidated damages for delay in the completion of the common facilities and for delay in delivery of the vacant possession of the parcel would be tantamount to double recovery which the law does not permit.

[47] In the premises, this court has held that the plaintiffs are not entitled to claim for financing interests paid or payable to the lender-bank over and above the liquidated damages claim for delay in delivery of possession, as that would constitute double recovery and/or overlapping claims.

[48] Further, this court also considers the liquidated damages for delay in completion and delivery stipulated in the agreement as the maximum amount of damages which under s 75 of the Contracts Act a contracting party is allowed to recover for such delay in completion and delivery. See the Federal Court's decisions in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817; [1995] 2 CLJ 584 and *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15; [2019] 2 CLJ 723. In the considered view of this court, the express and specific statutory provisions in the Housing Development (Control and Licensing) Act have modified and superseded the general provisions in s 75 of the Contracts Act to the extent that in claims under the Schedule H sale and purchase agreements in respect of residential properties, the vendor cannot argue that the correct rate of liquidated damages for delay in delivery of vacant possession of the parcel is 10%pa of the purchase price and that of delay in completion of the common facilities is one-fifth of 10%pa of the purchase price. What the Housing Development (Control and Licensing) Act has expressly and specifically stipulated as the rate of delay damages cannot be argued by the vendor as allegedly a penalty or not a genuine pre-estimate of delay damages. However, Housing Development (Control and Licensing) Act leaves untouched the general principle laid down in s 75 of the Contracts Act (as decided by the Federal Court in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817; [1995] 2 CLJ 584 and *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15; [2019] 2 CLJ 723) that

the liquidated damages stipulated in the contract shall represent the maximum ceiling of the delay damages recoverable in the event of such breach.

[49] In the premises, this court on 30 September 2021 dismissed the plaintiffs' claim for recovery of interests paid or payable by the plaintiff to the end-financing bank.

CONCLUSION

[50] In conclusion, this court held on 30 September 2021 that the plaintiffs' claims for liquidated damages under the Schedule H sale and purchase agreement has been clearly proved in the present case and that the defendant has not raised any issue or defence which ought to be tried.

[51] Accordingly, this court granted summary judgment in favour of the plaintiffs in the present case in the following terms:

(1) liquidated damages for failure to deliver vacant possession of the parcel within the contractual time in the amount of RM1,069,916.38 from 27 April 2015 to 8 April 2021;

(2) continuing liquidated damages for the failure to deliver vacant possession of the parcel at the rate of RM492.82 per day from 9 April 2021 until the date of delivery of the vacant possession;

(3) liquidated damages for failure to complete the common facilities within the contractual time in the amount of RM24,838.22 from 27 April 2015 until 9 April 2021;

(4) interests at 5%pa on the amounts in (1) and (3) from 9 April 2021 until the date of full realisation; and

(5) costs of RM6,000, subject to allocator.

Application allowed with costs.

Reported by Nuzul Fitrie